

# Intermediaries and the International Obligation to Protect Child Witnesses in South Africa\*

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## Abstract

This contribution examines the protection of child witnesses in criminal proceedings under international and regional laws. This consideration is made against the background that the *Constitution of the Republic of South Africa*, 1996 proclaims in section 39(1)(b) that in interpreting the Bill of Rights and any legislation a court or tribunal must consider international law. The United Nations *Convention on the Rights of the Child* (1989), the *African Charter on the Rights and Welfare of the Child* (1990) and the United Nations *Guidelines on Justice for Child Victims and Witnesses to Crime* (2005) do not make specific reference to child witnesses and how they should be treated. However, it is argued that the guiding principles enshrined therein provide for the protection of child witnesses, particularly the best interests of the child and the right to participate. In addition, the article enumerates and explains the rights of child witnesses as provided for in the UN Guidelines. International law will be discussed first, and then South African law, to establish if the international obligation to protect child witnesses is being adhered to.

## Keywords

Child witnesses; criminal proceedings; intermediary

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# 1 Introduction

The international child rights movement started in around 1924, when it led to the *Geneva Declaration of the Rights of the Child* (Geneva Declaration).<sup>1</sup> The Geneva Declaration is considered a remarkable, momentous document, recognising and affirming the existence of the human rights of children<sup>2</sup> for the first time in history.<sup>3</sup> Subsequently, in 1959, the UN *Declaration of the Rights of the Child*<sup>4</sup> was adopted, giving recognition to the vulnerabilities of children and proclaiming that children deserve special treatment in all matters concerning them.<sup>5</sup> Further, the adoption of the *Convention on the Rights of the Child*<sup>6</sup> and the *African Charter on the Rights and Welfare of the Child*<sup>7</sup> pronounced children's rights as human rights under international law. States parties have an obligation to protect, fulfil and promote the human rights of children, including the rights of “child witnesses”<sup>8</sup> to crime. Nevertheless, all these instruments do not specifically

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<sup>1</sup> *Geneva Declaration of the Rights of the Child* (1924), adopted 26 September 1924 by the League of Nations.

<sup>2</sup> A child is defined as any person under the age of 18 years, in terms of a 1 of the *United Nations Convention on the Rights of the Child* (1989) (CRC), a 2 of the *African Charter on the Rights and Welfare of the Child* (1990) (ACRWC) and s 28(3) of the *Constitution of the Republic of South Africa*, 1996.

<sup>3</sup> Humanium.org date unknown <https://www.humanium.org/en/declaration-rights-child-2>.

<sup>4</sup> *United Nations Declaration of the Rights of the Child* (1959) adopted unanimously by Member States of the United Nations General Assembly in Resolution 1386 (XIV), on 20 November 1959.

<sup>5</sup> Preamble of the 1959 *Declaration of the Rights of the Child*.

<sup>6</sup> South Africa signed the Convention on 21 January 1993 and adopted it on 16 June 1995.

<sup>7</sup> South Africa signed the Charter on 10 October 1997 and adopted it on 7 January 2000.

<sup>8</sup> “Child witnesses” in this context are defined in terms of para 9(a) of the *United Nations Guidelines on Justice in Matters Involving Child Victims and Witnesses of Crime* ECOSOC Resolution 2005/20 (2005) (UN Guidelines), as any person under the age of 18 who is a victim of or witness to a crime, regardless of the person's role in the offence or in the prosecution of the alleged offender or groups of offenders. Also see s 1 of the *Witness Protection Act* 112 of 1998 of South Africa, as any person below the age of eighteen years who is or may be required to give evidence, or who has given evidence in any criminal judicial proceedings. The study is limited to this group of persons with the exception of child offenders. This contribution focuses on

mention the term “child witness”. Specific reference to child witnesses in the criminal justice system is made in the UN Guidelines only.

South Africa has an obligation under international law to ensure the protection and care of child witnesses as is necessary for their well-being.<sup>9</sup> To fulfil this obligation, courts appoint intermediaries to cushion the child from hardships experienced in giving evidence and facilitating a friendly court environment for the child. However, the term “intermediary”, which is used in South African legislation, does not appear in the CRC or the ACRWC.

This contribution examines the protection of child witnesses in criminal proceedings under international and regional laws. The discussion takes place against the background that the *Constitution of the Republic of South Africa, 1996* (the *Constitution*) proclaims that in interpreting the Bill of Rights and any legislation, a court or tribunal must consider international law.<sup>10</sup> The CRC and the ACRWC do not make specific reference to child witnesses or how they should be treated. Be that as it may, the guiding principles enshrined therein provide for the protection of child witnesses, particularly the best interests of the child and the right to participate.<sup>11</sup> In addition, this article enumerates and explains the rights of child witnesses as provided for in the UN Guidelines. Furthermore, an analysis is made of the significance of intermediary services in the protection of child witnesses. International law will be discussed first, and then South African law (legislation and case law) to establish if the international obligation is being adhered to.

## 2 International law for the protection of child witnesses

Since the adoption of the CRC, children's rights have assumed a central position in a wide variety of disciplines and policing. It is regarded as the most distinguished source of children's rights and probably the most wide-ranging human rights treaty intended for a specific group of people.<sup>12</sup> The CRC has been commended as the most progressive of the treaties on the human rights of children,<sup>13</sup> and the ACRWC has also received praise. Anchored in four guiding principles, namely non-discrimination,<sup>14</sup> the right to life, survival and development,<sup>15</sup> participation<sup>16</sup> and the best interests of the

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a child who is a victim or survivor of crime rather than an accused who testifies in his or her own trial in terms of the *Criminal Procedure Act 51 of 1977* (the CPA).

<sup>9</sup> Article 3(2) of the CRC.

<sup>10</sup> Section 39(1)(b) of the *Constitution*.

<sup>11</sup> See 2.1 and 2.2 below.

<sup>12</sup> Schafer *Child Law* 90.

<sup>13</sup> Van Bueren *International Law of the Rights of the Child* 402.

<sup>14</sup> Article 2 of the CRC; also see a 3 of the ACRWC.

<sup>15</sup> Article 6 of the CRC; also see a 5 of the ACRWC.

<sup>16</sup> Article 12 of the CRC; also see aa 4(2) and 7 of the ACRWC.

children concerned,<sup>17</sup> these instruments are the cornerstone of children's rights.

It goes without saying that the CRC does not address the issue of child witnesses in criminal proceedings save by providing for child offenders in conflict with the law.<sup>18</sup> It is submitted that the failure of the CRC to refer to child witnesses does not mean that child witnesses are not protected. The over-arching guiding principles are instructive on how the best interests of child witnesses testifying in criminal proceedings should be protected. The discussion that follows elaborates on how the guiding principles may assist in the protection of child witnesses.

## **2.1 The best interests of the child**

The concept of the best interests of the child is arguably aimed at ensuring the full and effective realisation and enjoyment of all children's rights recognised in the CRC.<sup>19</sup> Ultimately the CRC promotes the holistic development of the child in all aspects that concern the child. The concept of the "child's best interests" is not new.<sup>20</sup> However, the CRC developed and transformed the latitude and application of the principle beyond its original scope.<sup>21</sup> The principle is considered to be a dynamic concept that encompasses various issues that are continuously evolving.<sup>22</sup> It is argued that this principle meets the requirements of customary international law.<sup>23</sup> The CRC proclaims that:<sup>24</sup>

In all actions concerning children, whether undertaken by public or private social welfare institutions, *courts of law*, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

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<sup>17</sup> Article 3 of the CRC; also see a 4(1) of the ACRWC.

<sup>18</sup> Article 40 of the CRC provides for juvenile justice, proclaiming that a child in conflict with the law has the right to treatment which promotes the child's sense of dignity and worth, takes the child's age into account, and aims at his or her reintegration into society. The child is entitled to basic guarantees as well as legal or other assistance for his or her defence. Judicial proceedings and institutional placements shall be avoided wherever possible, and detention would be a measure of last resort.

<sup>19</sup> Paragraph 4 of *Committee on the Rights of the Child General Comment No 14: The Right of the Child to have his or her Best Interests Taken as a Primary Consideration* UN Doc CRC/C/GC/14 (2013) (General Comment No 14).

<sup>20</sup> It pre-dates the CRC. It is enshrined in para 2 of the 1959 *Declaration of the Rights of the Child* and a 16(1)(d) of the *Convention on the Elimination of All Forms of Discrimination against Women* (1979).

<sup>21</sup> Mabery "United Nations Convention on the Rights of the Child" 318.

<sup>22</sup> Paragraph 5 of General Comment No 14.

<sup>23</sup> Schafer *Child Law* 154.

<sup>24</sup> Article 3(1) of the CRC.

The provision is clear and crafted in unambiguous terms. The best interests of the child witness is a primary consideration. Reference to "a primary consideration" connotes that the child's best interest is not the overriding factor to consider, but should be considered amongst other competing or conflicting interests.<sup>25</sup> The principle cannot be considered in isolation but in the context of all the provisions of the CRC.<sup>26</sup> Further, the provision should be read together with other relevant rights, giving recognition to the universal, indivisible, interdependent and interrelated nature of the human rights of children.<sup>27</sup>

On the other hand, the ACRWC is differently worded and arguably offers much more protection than the CRC:<sup>28</sup>

In all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration.

The use of "the" and not "a" primary consideration places more emphasis on the best interests of the child. It is not one consideration amongst others, but is the primary consideration.<sup>29</sup> The best interest of the child is identified as the criterion against which a state party has to measure all aspects of its laws and policy regarding children.<sup>30</sup>

The challenge arises when applying the principle to individual cases. Due to the indeterminate nature of the principle, social workers (intermediaries), lawyers (magistrates, prosecutors and defence counsel) and child psychologists might legitimately draw varying conclusions about what is in the best interests of the same child.<sup>31</sup> Thus, when a child witness is called to testify, a prime consideration is what will be in the best interests of that child. This determination demands the need to strike a balance between the interests of the administration of justice and the interests of the child witness. The responsibility for the decision as to whether the child's best interest takes precedence over other competing interests is vested upon the determining authority. The application of the principle is inherently susceptible to the influence of the decision-maker or the determining authority's life experiences, and is therefore subjective.<sup>32</sup> The duty imposed upon the determining authority to consider the child's best interests, requires

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<sup>25</sup> Mabery "United Nations Convention on the Rights of the Child" 319.

<sup>26</sup> Hodgkin and Newell *Implementation Handbook* 37.

<sup>27</sup> Paragraph 6 of General Comment No 14.

<sup>28</sup> Article 4(1) of the ACRWC.

<sup>29</sup> Mezmur 2008 *SAPR/PL* 18.

<sup>30</sup> Viljoen "African Charter on the Rights and Welfare of the Child" 219.

<sup>31</sup> Schafer *Child Law* 154-155.

<sup>32</sup> Reece 1996 *CLP* 267.

those interests to actually be taken into account, and not merely to be noted.<sup>33</sup>

In this context the National Prosecuting Authority (NPA), the Department of Justice and Constitutional Development (DJCD) and the Department of Social Development (DSD) are the state institutions responsible for ensuring that the best interests of child witnesses are taken into account.

## **2.2 Expressing the child's views**

A child's right to express his or her opinion freely and to participate in matters concerning himself or herself is firmly entrenched in international law.<sup>34</sup> This right is based on the recognition that children are rights holders. They are individuals with distinctive personalities and not small adults.<sup>35</sup>

The CRC<sup>36</sup> provides that:

States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

The phrase "shall assure" is a legal term of special strength, which leaves no leeway for the discretion of States Parties.<sup>37</sup> In so far as there is an imposition of the duty, it is argued that the formulation of the right is ambiguous, since there is no clear or practical definition of a child's capacity to express his or her views.<sup>38</sup> Instead, the right requires a factual assessment of the child's capacity with reference to his or her evolving capacities. The element of evolving capacities considers the child's ability to understand and comprehend the matter at hand and express an independent, reasonable opinion.<sup>39</sup> The age of the child thus permitted to express his or her views is not limited.<sup>40</sup> Even children as young as five

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<sup>33</sup> McAdam 2006 *Int'l J Children's Rts* 254.

<sup>34</sup> Article 12 of the CRC, and a 7 of the ACRWC, and a similar right has been inferred from the due process rights protected by a 14(1) of the *International Covenant on Civil and Political Rights* (1966).

<sup>35</sup> *S v M (Center for Child Law as Amicus Curiae)* 2008 3 SA 232 (CC) para 18, wherein Sachs J stated that: "every child has his or her own dignity. If a child is to be constitutionally imagined as an individual with a distinctive personality, and not merely as a miniature adult waiting to reach full size, he or she cannot be treated as a mere extension of his or her parents, umbilically destined to sink or swim with them."

<sup>36</sup> Article 12(1) of the CRC.

<sup>37</sup> Paragraph 8 of the *Committee on the Rights of the Child General Comment No 12: The Right of the Child to be Heard* UN Doc CRC/C/GC/12 (2009) (General Comment No 12).

<sup>38</sup> Schafer *Child Law* 164.

<sup>39</sup> Paragraph 30 of General Comment No 12.

<sup>40</sup> Paragraph 9 of General Comment No 12.

years old may express their views, as long as they can be deemed competent to testify.<sup>41</sup> Full implementation of the right to participate requires the recognition of and respect for non-verbal forms of communication including play, body language, facial expressions, and drawing and painting, through which very young children demonstrate their understanding, choices and preferences.<sup>42</sup> It is also important to take into account the views of child witnesses with disabilities.<sup>43</sup>

The child is afforded an opportunity to express his or her views in two ways, which are by means of participation<sup>44</sup> or representation,<sup>45</sup> as articulated in the CRC:<sup>46</sup>

For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.<sup>47</sup>

Further, the child is assured of the freedom to express himself or herself in matters concerning him or her.<sup>48</sup> Thus a child witness has to be provided with a platform to express his or her concerns, wishes and views about testifying in criminal proceedings either directly or through an intermediary.<sup>49</sup> The child can express his or her views directly to the intermediary or social worker, who will in turn represent or communicate these views to the court. If the noting of the child's views is undertaken through a representative, it is of the utmost importance that these views are transmitted correctly to the decision maker by the representative.<sup>50</sup> In the same article the ACRWC knits the best interests together with the right to participate, declaring that:<sup>51</sup>

In all judicial proceedings affecting a child who is capable of communicating his or her own views, an opportunity shall be provided for the views of the child

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<sup>41</sup> Paragraph 14 of the *Committee on the Rights of the Child General Comment No 7: Implementing Child's Rights in Early Childhood* UN Doc CRC/C/GC/7/Rev.1 (2006) (General Comment No 7). Also see the case of *Wheeler v United States* 159 US 523 (1895), in which the court allowed a five year-old to testify in a homicide case.

<sup>42</sup> Paragraph 21 of General Comment No 12.

<sup>43</sup> Paragraph 32 of General Comment No 9.

<sup>44</sup> This refers to rules and measures to ensure the child is heard directly without an intermediary.

<sup>45</sup> This refers to provisions that allow a child to instruct an attorney, seek legal advice or have a form of representation in legal proceedings other than that accorded to an adult person.

<sup>46</sup> Davel "General Principles" 12.

<sup>47</sup> Article 12(2) of the CRC.

<sup>48</sup> Article 7 of the ACRWC.

<sup>49</sup> This concept will be discussed later in the article. It is closely linked to the mechanism in place for the protection of child witnesses.

<sup>50</sup> Paragraph 36 of General Comment No 12.

<sup>51</sup> Article 4(2) of the ACRWC.

to be heard either directly or through an impartial representative..., and those views shall be taken into consideration...

The deciding authority must give due consideration to the child's views and opinions. This does not mean that what the child expresses becomes the final decision. Rather, it is the duty of the decision maker to establish what is best for the child. Thus, a decision different from that which the child wants may be taken.<sup>52</sup>

Accordingly, it is submitted that South Africa is under an obligation to safeguard the right of child witnesses to participate in cases concerning them, and every effort has to be made to ensure that child witnesses are consulted and given an opportunity to express their views regarding participating or testifying in criminal proceedings.

### **3 The UN Guidelines on Justice for Child Witnesses of Crime**

The UN General Assembly adopted the *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* (Declaration of Basic Principles)<sup>53</sup> which provides a framework for responding to the challenges and needs of victims. The Declaration of Basic Principles outlines measures to assist the victims of crime on international, regional and national levels.<sup>54</sup> In 2004 an intergovernmental expert group was set up at the request of the UN Economic and Social Council (ESC) to develop guidelines on justice in matters involving child victims and witnesses of crime. Based on the guidelines drawn up by the International Bureau of Children's Rights, the ESC adopted the *United Nations Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime* (UN Guidelines).<sup>55</sup> The UN Guidelines are not binding upon States Parties to the CRC, or to the UN treaties, but are of a persuasive value. They provide a useful framework to guide and assist member States in enhancing the protection of child witnesses in the criminal justice system, setting out good practice based on the consensus of contemporary knowledge and relevant international and regional norms, standards and practices.<sup>56</sup> This is to assist, support and

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<sup>52</sup> Schafer *Child Law* 166.

<sup>53</sup> *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* (1985), adopted on 29 November 1985 at the 96th plenary meeting, A/RES/40/34.

<sup>54</sup> Skelton *Justice for Child Victims* 1.

<sup>55</sup> *United Nations Guidelines on Justice in Matters Involving Child Victims and Witnesses of Crime* ECOSOC Resolution 2005/20 (2005) (UN Guidelines).

<sup>56</sup> Paragraph 1 of the UN Guidelines.



guide professionals<sup>57</sup> working with child witnesses of crime in their day-to-day practice.<sup>58</sup>

The UN Guidelines were developed with special consideration in mind of the inadequate recognition of the rights of child witnesses and their suffering of additional hardship when assisting in the justice process.<sup>59</sup> In addition, they were a realisation of the fact that children are vulnerable and require special protection appropriate to their gender, age, level of maturity and individual special needs<sup>60</sup> as they offer support to the criminal justice system.

### ***3.1 Guiding principles for the protection of child witnesses***

The UN Guidelines are based on cross-cutting principles reflecting the spirit and word of the CRC.<sup>61</sup> However, there is no express mention of the term "intermediary" in the list of professionals enumerated therein. It is submitted that intermediaries can be placed in the category of social workers.<sup>62</sup> That being the case, intermediaries are guided by the principles, guidelines and recommendations provided in the UN Guidelines.

The first guiding principle is the right to dignity, which provides for the protection of every child's right to dignity by treating each individual as a unique and valuable human being. Respecting and protecting the right to dignity upholds the right to privacy and takes into account the special needs and interests of every individual child.<sup>63</sup> The second principle provides for equality and non-discrimination as follows:<sup>64</sup>

Every child has the right to be treated fairly and equally, regardless of his or her or the parent's or legal guardian's race, ethnicity, colour, gender, language, religion, political or other opinion, national, ethnic or social origin, property, disability and birth or other status.

The third principle makes provision for the right of the child to express his or her views, wishes and opinions. The right to be heard and to participate

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<sup>57</sup> Paragraph 9(b) of the UN Guidelines in which the term is used with reference to persons who, within the context of their work, are in contact with child witnesses of crime or are responsible for addressing the needs of children in the justice system including but not limited to: child support persons, child protection service practitioners, prosecutors and, where appropriate, defence lawyers, judges and magistrates, court interpreters and intermediaries, law enforcement officials, and social workers.

<sup>58</sup> Paragraphs 3(c) and (d) of the UN Guidelines.

<sup>59</sup> Paragraph 7(a) of the UN Guidelines.

<sup>60</sup> Paragraph 7(b) of the UN Guidelines.

<sup>61</sup> Van der Merwe "Children as Victims and Witnesses" 566.

<sup>62</sup> Paragraph 9(b) of the UN Guidelines defines professional to include social workers.

<sup>63</sup> Paragraph 8(a) of the UN Guidelines.

<sup>64</sup> Paragraph 8(b) of the UN Guidelines.

is applied on an individual basis, taking into consideration personal circumstances as they are interpreted within the applicable municipal laws. The UN Guidelines<sup>65</sup> provide as follows:

Every child has, subject to national procedural law, the right to express his or her views, opinions and beliefs freely, in his or her own words, and to contribute particularly to the choices influencing his or her life, including those taken in any judicial processes, and to have those views taken into consideration according to his or her abilities, age, intellectual maturity and evolving capacity.

The fourth principle outlined in the UN Guidelines is the best interests of the child principle.<sup>66</sup> The principle stipulates that every child has the right to have his or her best interests given primary consideration at all levels. The best interests of the child witness compete with the rights of the accused.<sup>67</sup> As a result, there has to be a balancing of these and other competing interests.<sup>68</sup> While there is a need to safeguard the rights of the accused or the offender,<sup>69</sup> the best interests of the child should be given primary consideration.<sup>70</sup>

The best interests of the child principle recognises the right to the protection and the promotion of the harmonious development of the child after the child's involvement in the case. The right to protection entails that every child has to be shielded from any form of hardship or abuse, including physical, psychological, mental and emotional abuse.<sup>71</sup> In essence, protecting the child's best interests goes beyond protecting the child from victimisation and hardship while the child is involved in the justice process as a witness. It also enhances the child's capacity to contribute to that process.<sup>72</sup>

On the other hand, the element of promoting the harmonious development of the child assures that the child is provided with a chance for harmonious growth and a standard of living adequate for physical, mental, spiritual, moral and social growth.<sup>73</sup> Each case requires a careful assessment of the situation of the child in order to decide which intervention is in the best interests of the child.<sup>74</sup> Where a child witness has been traumatised by

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<sup>65</sup> Paragraph 8(d) of the UN Guidelines.

<sup>66</sup> Paragraph 8(c) of the UN Guidelines.

<sup>67</sup> The right to a fair trial and the right to confront the accuser as espoused in a 14(3)(e) of the *International Covenant on Civil and Political Rights* (1966).

<sup>68</sup> Burgos Mata *et al Handbook for Professionals* 8.

<sup>69</sup> Article 14 of the *International Covenant on Civil and Political Rights* (1966), a 7 of the *African Charter on Human and People's Rights* (1981).

<sup>70</sup> Burgos Mata *et al Handbook for Professionals* 6.

<sup>71</sup> Paragraph 8(d)(i) of the UN Guidelines.

<sup>72</sup> Burgos Mata *et al Handbook for Professionals* 9.

<sup>73</sup> Paragraph 8(d)(ii) of the UN Guidelines.

<sup>74</sup> Burgos Mata *et al Handbook for Professionals* 10.

witnessing a crime, every step should be taken to enable the child to enjoy healthy development thereafter.<sup>75</sup> These measures include the provision of psychosocial support to build the child's resilience.

Giving the best interests of the child primary consideration is in conformity with the CRC and is therefore consistent with international law on safeguarding the interests of justice. Further, guarding the best interests of the child witness promotes the protection of other principles such as the right to dignity, the right to participate, and non-discrimination.

### **3.3 Protection of the right to dignity**

The UN Guidelines describe the rights of child witnesses.<sup>76</sup> The rights<sup>77</sup> are interconnected and cannot be applied in isolation. The right to dignity is a fundamental and inherent human right enshrined in various international instruments.<sup>78</sup> It is also one of the guiding principles to the UN Guidelines.<sup>79</sup> The right implies that the child is treated as a human being with full rights and not as a passive recipient of adult care and protection.<sup>80</sup> The right is further complemented with showing compassion to the child. The witness' right to be treated with dignity and compassion lays the foundation for the child-sensitive<sup>81</sup> treatment of all child witnesses.<sup>82</sup> Every individual child should be treated as a distinct person with his or her individual needs, wishes and feelings, in a caring and sensitive manner, taking into account personal situations and immediate needs, age, gender, mental or moral integrity, disability and level of maturity.<sup>83</sup> The evolving capacities of an individual child warrant treatment according to his or her age and level of maturity. The levels of understanding of any given situation may differ from one child to the next. The level of understanding is different from that of an

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<sup>75</sup> Paragraph 8(d)(ii) of the UN Guidelines.

<sup>76</sup> Paragraphs 10-39 of the UN Guidelines.

<sup>77</sup> It is trite to note that most of these rights are realisable through the services of the intermediary; for instance: the right to be treated with dignity, the right to be informed of the justice processes and the right to be heard and express views and concerns.

<sup>78</sup> Article 1 of the *Universal Declaration of Human Rights* (1948), a 1 of the *International Covenant on Civil and Political Rights* (1966), preamble of the *International Covenant on Economic, Social and Cultural Rights* (1966), preamble of the *Convention on the Elimination of All Forms of Discrimination against Women* (1979) and others.

<sup>79</sup> See 3.1 above.

<sup>80</sup> Burgos Mata *et al Handbook for Professionals* 15.

<sup>81</sup> The term as used in the UN Guidelines denotes an approach that balances the child's right to protection and that takes into account the child's individual needs and views.

<sup>82</sup> Burgos Mata *et al Handbook for Professionals* 14.

<sup>83</sup> Paragraph 10 of the UN Guidelines.

adult, yet children have the potential to be precise and deliver credible testimony.<sup>84</sup> Lansdown<sup>85</sup> argues that:

The concept of evolving capacities is invoked as it is fundamental to a balance between recognising the child as an active agent in his or her own life, entitled to be listened to, respected and granted autonomy in the exercise of rights, while also being entitled to protection in accordance with his or her relative immaturity and youthfulness.

Having an understanding of the evolving capacity of the child and its impact on the justice process may help to anticipate what services children require in their particular situation in order to preserve or gain their integrity.<sup>86</sup> It is submitted that the concept of evolving capacities ensures respect for the child, without exposing him or her prematurely to the full responsibilities normally associated with adulthood; and takes into consideration the child's needs, age, gender, disability and level of maturity.<sup>87</sup>

Accordingly, children also have the right to be treated with compassion, which implies understanding and being sensitive to their feelings, needs, beliefs,<sup>88</sup> communicative style and individual experiences.<sup>89</sup> Any professional dealing with a child witness of crime should recognise that the child may not be in a position, at a given time, to fully understand and recount the events that happened, or to comprehend the full impact of the crime.<sup>90</sup>

It is imperative to ensure that all the processes involving children as witnesses, such as interviews,<sup>91</sup> are conducted in a child-friendly environment,<sup>92</sup> and respect the child's right to privacy.<sup>93</sup> It is crucial to ensure that the child does not feel responsible for the commission of the

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<sup>84</sup> Burgos Mata *et al Handbook for Professionals* 15.

<sup>85</sup> Lansdown *Evolving Capacities of the Child* 3.

<sup>86</sup> Burgos Mata *et al Handbook for Professionals* 15.

<sup>87</sup> Lansdown *Evolving Capacities of the Child* 4.

<sup>88</sup> Paragraph 11 of the UN Guidelines.

<sup>89</sup> Paragraph 14 of the UN Guidelines.

<sup>90</sup> Burgos Mata *et al Handbook for Professionals* 15 – as a result of a lack of maturity of fear, for instance.

<sup>91</sup> Paragraph 13 of the UN Guidelines provides that: "Interviews, examinations and other forms of investigation should be conducted by trained professionals who proceed in a sensitive, respectful and thorough manner in order to avoid further hardship to the child."

<sup>92</sup> Paragraph 14 of the UN Guidelines proclaims that: "Interactions should take place in a suitable environment that accommodates the special needs of the child, according to his or her abilities, age, intellectual maturity and evolving capacity and also in a language that the child uses and understands."

<sup>93</sup> Paragraph 12 of the UN Guidelines.

crime or the events surrounding it, or to feel accountable for what he or she has suffered.<sup>94</sup>

### **3.4 The right to be heard and to express views**

The right to be heard, to express views or concerns, and to have those views and concerns taken seriously is important to ensuring that the rights of children are realised.<sup>95</sup> It is embedded in the CRC and the principle affirms that children are fully-fledged persons who have the right to express their views in all matters affecting them.<sup>96</sup> It is required that those views be heard and given due weight in accordance with the age and maturity of the child.<sup>97</sup> In terms of this principle adults are no longer seen as mere providers, protectors or advocates, but also as negotiators and facilitators, creating spaces and promoting processes designed to enable and empower children to express their views, to be consulted<sup>98</sup> and to influence decisions.<sup>99</sup>

However, it is submitted that the UN Guidelines<sup>100</sup> do not create an obligation to satisfy the requirements and expectations expressed by the child.<sup>101</sup> If the requirements and expectations of the child cannot be met, this should be explained to him or her. A child witness' expectation may be contrary to the demands of the court system. For this reason it must be explained to the child, in a child-friendly manner, why certain decisions are made, why certain elements or facts are or are not discussed or questioned in court, and why certain views are not taken into consideration.<sup>102</sup>

The challenge associated with the realisation of child witnesses' right to express their views and concerns in the context of the criminal justice system is that witnesses have traditionally been considered as tools, and often expendable ones, in the quest for a successful prosecution.<sup>103</sup>

### **3.5 Protection from hardships during the trial**

The UN Guidelines acknowledge that indeed children are vulnerable when testifying during trial proceedings. The court experience is very stressful for

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<sup>94</sup> Burgos Mata *et al Handbook for Professionals* 15.

<sup>95</sup> Paragraph 21 of the UN Guidelines.

<sup>96</sup> Article 12 of the CRC.

<sup>97</sup> Burgos Mata *et al Handbook for Professionals* 42.

<sup>98</sup> Paragraph 21 of the UN Guidelines asserts that: "Professionals (included as intermediaries) should make every effort to enable child witnesses to express their views and concerns related to their involvement in the justice process, through consultation with the child."

<sup>99</sup> Burgos Mata *et al Handbook for Professionals* 42.

<sup>100</sup> Paragraph 21(c) of the UN Guidelines.

<sup>101</sup> Burgos Mata *et al Handbook for Professionals* 43.

<sup>102</sup> Burgos Mata *et al Handbook for Professionals* 43.

<sup>103</sup> Burgos Mata *et al Handbook for Professionals* 43.

children.<sup>104</sup> This stress is caused by the fear that children may have of testifying in a court, which may include but not be limited to facing the accused,<sup>105</sup> describing disgraceful details of the case, and not being able to understand the questions put to them.<sup>106</sup> Thus, the UN Guidelines proclaim that professionals should take appropriate measures<sup>107</sup> to prevent the inflicting of hardship on a child during the prosecution process in order to ensure that the best interests and dignity of the child witness are respected.<sup>108</sup> Ultimately, protecting child witnesses from hardship during a trial increases their capacity to participate in the justice process.<sup>109</sup> It is submitted that the use of intermediaries is another measure that facilitates or mitigates the occurrence of further hardships upon the child witness.

The right of the child witness to be protected from hardships and the right to be safe guarantee that the giving of evidence in court becomes a validating experience which does not necessarily have to be harmful.<sup>110</sup> The use of child-sensitive procedures is recommended, including interview rooms designed for children, modified court environments that take child witnesses into consideration, recesses during a child's testimony, hearings scheduled at times of day appropriate to the age and maturity of the child, and other appropriate measures to facilitate the child's testimony.<sup>111</sup> The intermediary will act in the best interests of the child to monitor the performance of the child during testimony, and when necessary recommend an adjournment or recess. Thus, it is recommended that the child witness should testify when he or she seems able and willing to do so. In this respect, a well-prepared and child-friendly trial may in fact prove beneficial, as it offers the child an opportunity to actively participate in the administration of justice and to formally denounce injustice.<sup>112</sup>

## 4 South Africa

The South African courts have expressed the difficulty of dealing with child witnesses in the administration of justice.<sup>113</sup> The recognition of the

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<sup>104</sup> Burgos Mata *et al Handbook for Professionals* 67.

<sup>105</sup> This relates to *in camera* proceedings not conducted by way of the closed circuit television (CCTV) facility.

<sup>106</sup> Burgos Mata *et al Handbook for Professionals* 67.

<sup>107</sup> For instance the use of CCTV.

<sup>108</sup> Paragraph 29 of the UN Guidelines.

<sup>109</sup> Burgos Mata *et al Handbook for Professionals* 66.

<sup>110</sup> Burgos Mata *et al Handbook for Professionals* 67.

<sup>111</sup> Paragraph 30(d) of the UN Guidelines.

<sup>112</sup> Burgos Mata *et al Handbook for Professionals* 67.

<sup>113</sup> *S v Vilakazi* 2009 1 SACR 552 (SCA) para 21. The court stated that the prosecution of sexual crimes always presents peculiar difficulties especially when the complainant (the witness) is a young person. For the prosecution, it calls for thoughtful preparation, patient and sensitive presentation of all the available

vulnerabilities of child witnesses came to light in the late 1980's, prompting the introduction of more specialised approaches and innovative child-centred procedures.<sup>114</sup> These measures include the protection of the child witness from direct confrontation with the accused or his or her legal representative. These "in camera" proceedings involve placing a child in a separate room other than the courtroom, and making use of an intermediary and closed-circuit television (CCTV).<sup>115</sup>

The process of addressing these difficulties involved extensive investigation and research into the challenges of using child witnesses in the criminal justice system.<sup>116</sup> The South African Law Commission (SALC) concluded the report by recommending that special measures should be taken when a child is testifying in criminal proceedings. This is when the proposal to have an intermediary system was tabled as a possible solution, resulting in statutory amendments.<sup>117</sup> As a result, in July 1993 an intermediary was appointed for the first time in South Africa.<sup>118</sup> The use of intermediary services is discussed below.<sup>119</sup>

The protection of victims and witnesses is complemented by the adoption of the Victims Charter and the *Minimum Service Standards for Victims of Crime* (2004) (Minimum Service Standards). The Victims Charter and Minimum Service Standards are significant documents available to witnesses to crime for claiming their rights and to act in ensuring the realisation of these rights. The same enumerate the rights of victims and witnesses to crime, without specific reference to children. It is submitted that children, as human beings, have the right to enjoy the rights provided in the Victims Charter and the Minimum Service Standards.

## 5 Constitutional rights of child witnesses

The *Constitution* does not explicitly mention the protection of child witnesses within the criminal justice system. It provides for an over-arching protection of children, proclaiming that the best interests of the child are the paramount considerations in all matters concerning the child.<sup>120</sup> In practice, children's

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evidence and meticulous attention to detail. For judicial officers who try such cases, it calls for accurate understanding and careful analysis of all the evidence.

<sup>114</sup> Morgan and William 1993 *BJSW* 23.

<sup>115</sup> Schoeman *Training Program for Intermediaries* 35. Also see *S v Vilakazi* 2009 1 SACR 552 (SCA).

<sup>116</sup> In 1989 the South African Law Commission (SALC) conducted the research and made recommendations.

<sup>117</sup> *Criminal Law Amendment Act* 135 of 1991 which inserted s 170A in the CPA.

<sup>118</sup> Schoeman *Training Program for Intermediaries* 203.

<sup>119</sup> It should be noted that the discussion of intermediaries is meant to show the efforts made to protect child witnesses in South Africa.

<sup>120</sup> Section 28 of the *Constitution*.

interests, views and experiences are often considered secondary to the interests of the criminal justice system, and of the adults who work in that system.<sup>121</sup> The *Constitution* guarantees children the right to dignity,<sup>122</sup> equality before the law,<sup>123</sup> and protection from maltreatment, neglect, abuse or degradation,<sup>124</sup> amongst other factors discussed hereunder.

### 5.1 *The best interests principle as a right*

Section 28(2) of the *Constitution* entrenches the best interests of the child in the Bill of Rights as being of paramount importance in all matters concerning the child. The phrase "all matters concerning the child" implies every action or matter affecting the child, including child witnessing.

*Ex facie*, the provision seems to reiterate a principle that is recognised in common law through case law.<sup>125</sup> Due to constitutional developments, the courts have categorised the best interests' principle as a right going further than the common law principle.<sup>126</sup> The Constitutional Court has had the opportunity in several cases to interpret and explain the unique role of the best interests in South Africa's jurisprudence. In 2000, as per Goldstone J,<sup>127</sup> the Constitutional Court stated that:

Section 28(1) is not exhaustive of children's rights. Section 28(2) requires that a child's best interests have paramount importance in every matter concerning the child. The plain meaning of the words indicates that the reach of section 28(2) cannot be limited to the rights enumerated in section 28(1) and section 28(2) must be interpreted to extend beyond those provisions. It creates a right that is independent of those specified in section 28(1).

Another important case is *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development* 2009 2 SACR 130 (CC) (*DPP v Minister of Justice*), which came before the Constitutional Court for confirmation and the declaration of the unconstitutionality of section 170A of the CPA, in that it was inconsistent with section 28(2) of the *Constitution*.<sup>128</sup> The approach of the Constitutional Court was that in every

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<sup>121</sup> Christina and Blanche *RAPCAN's Child Witness Project* 7.

<sup>122</sup> Section 10 of the *Constitution*.

<sup>123</sup> Section 9 of the *Constitution*.

<sup>124</sup> Section 28(1)(d) of the *Constitution*.

<sup>125</sup> In *Fletcher v Fletcher* 1948 1 SA 130 (A), the Appellant Division laid down the principle.

<sup>126</sup> *Centre for Child Law v Minister of Home Affairs* 2005 6 SA 50 (T) para 16.

<sup>127</sup> *Minister of Welfare and Population Development v Fitzpatrick* 2000 3 SA 422 (CC) para 17.

<sup>128</sup> Bertelsmann J consolidated the cases *S v Mokoena*, *S v Phaswane* 2008 5 SA 578 (T) and *mero-motu* proceeded to consider the constitutional validity of certain provisions of the CPA, including ss 153, 158, 164(1) and 170A. All of the provisions under consideration were concerned with the protection to be awarded to child complainants when they give evidence in criminal proceedings involving sexual



trajectory in which a child is to testify, the court will enquire into the desirability (the reasonableness) of appointing an intermediary. In doing so, the judicial officer should consider whether, on the evidence presented, viewed in the light of the objectives of the *Constitution* and the subsection, it is in the best interests of the child that an intermediary be appointed.<sup>129</sup> The court also stressed that every child is unique and has his or her own individual dignity, special needs and interests which have to be taken into account.<sup>130</sup> What is required is individual justice, that is, justice which is appropriately tailored to the needs of the individual case.<sup>131</sup> Hence, the court intertwined the test of undue mental stress or suffering with the test of the best interests of the child.<sup>132</sup>

The Constitutional Court held that, contrary to the High Court's view<sup>133</sup> that the child should first be exposed to undue mental stress or suffering before the provision may be invoked, the object of the provision is to prevent the child from being exposed in the first place.<sup>134</sup> A child has to be assessed prior to giving evidence in court to determine whether there is a need for the appointment of an intermediary. Such a procedure would, according to the court, ensure that both the objectives of section 170A(1) of the Act and section 28(2) of the *Constitution* are achieved.<sup>135</sup> Factors that have to be considered include the principle of the best interests of the child as set out in section 28(2) thereof, and the objectives of section 170A(1), namely to prevent the child from exposure to the undue stress that may arise from giving evidence in court.<sup>136</sup>

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abuse. After carefully examining these provisions, the High Court declared ss 153(3) and (5); 158(5); 164(1); and 170A(1) and 170A(7) of the CPA invalid on the grounds that they infringed the "best interests" of child complainants as guaranteed in s 28(2) of the *Constitution*. The High Court then referred its declaration of invalidity to the Constitutional Court for confirmation in terms of s 172(2)(a) of the *Constitution*. The Constitutional Court, however, refused to do so, expounded on the object of s 170A(1), and assessed the constitutionality of the provisions in line with s 28(2) of the *Constitution*.

<sup>129</sup> *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development* 2009 2 SACR 130 (CC) paras 114-115; see also Bekink 2014 CARSA 41.

<sup>130</sup> *DPP v Minister of Justice* para 120.

<sup>131</sup> *DPP v Minister of Justice* paras 123-124.

<sup>132</sup> Bekink 2014 CARSA 41. This approach was also followed in *Kerkhoff v Minister of Justice and Constitutional Development* 2011 2 SACR 109 (GNP) para 7 as per Southwood J who, after referring to *DPP v Minister of Justice*, added that: "it is clear that the enquiry has a narrow focus: to determine whether it is in the best interests of the child that an intermediary be appointed."

<sup>133</sup> *S v Mokoena, S v Phaswane* 2008 5 SA 578 (T) para 79.

<sup>134</sup> Bekink 2014 CARSA 41.

<sup>135</sup> *DPP v Minister of Justice* paras 111-112.

<sup>136</sup> Bekink 2014 CARSA 40.

The fundamental rights of child witnesses, particularly the right to dignity, the right to bodily and psychological integrity, and the rights to individual autonomy are encapsulated in section 28(2) of the *Constitution*.<sup>137</sup> For instance, it has been repeatedly held by the Constitutional Court that section 28(2) indeed establishes a fundamental right and not a mere guiding principle.<sup>138</sup> Thus, it is respectfully submitted that child witnesses are constitutionally protected from the violation of their right to dignity and psychological integrity within the right enshrined in section 28(2) of the *Constitution*.

The best interests' injunction within the *Constitution* is a prescription that is also located in the *Children's Act*,<sup>139</sup> which provides that:

In all matters concerning the care, protection and well-being of a child the standard that the child's best interest is of paramount importance must be applied.

It is a standard that is set and paramount in matters that concern the protection of children, in this context, the protection of child witnesses. The rights that a child has in terms of the *Children's Act* supplement the rights that a child has in terms of the Bill of Rights enshrined in the *Constitution*.<sup>140</sup> The best interests principle in section 9 of the *Children's Act* cannot be applied in isolation of the right enshrined in section 28(2) of the *Constitution*.<sup>141</sup> The articulation of the provisions means that a child witness' best interests are to be considered within the framework of his or her constitutional rights, yet the requirement that the best interests of the child be borne in mind is a useless injunction if it is applied without consideration of the child's right to participate, to be heard and to be taken seriously.

## **5.2 Right to participation**

Section 28 of the *Constitution* does not explicitly provide for the right of the child to participate. The *Constitution* provides for freedom of expression<sup>142</sup> but does not clearly provide for the right to participate as provided for in the *Children's Act*. The right to participate is read together with section 28(2) of

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<sup>137</sup> Prinsloo 2008 CARSA 58.

<sup>138</sup> Robinson 2013 *THRHR* 410; also see *Minister of Welfare and Population Development v Fitzpatrick* 2000 3 SA 422 (CC); *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division* 2004 1 SA 406 (CC); *S v M (Centre for Child Law as Amicus Curiae)* 2008 3 SA 232 (CC). In *Fitzpatrick* para 17, the court held that s 28(2) creates a right that is independent of those specified in s 28(1).

<sup>139</sup> Section 9 of the *Children's Act* 38 of 2005 (*Children's Act*).

<sup>140</sup> Section 8 of the *Children's Act*.

<sup>141</sup> Schafer *Child Law* 65.

<sup>142</sup> Section 16(1) of the *Constitution*. This provision does not clearly articulate the right of the child to be heard, to participate and be taken seriously as enshrined in the CRC and the ACRWC.

the *Constitution*. The *Children's Act*<sup>143</sup> incorporates this right, proclaiming that:

Every child that is of such an age, maturity and stage of development as to be able to participate in any matter concerning that child has the right to participate in an appropriate way, and views expressed by the child must be given due consideration.

Thus, it is submitted that the appointment of an intermediary is to promote and facilitate the active participation of the child witness. The intermediary builds rapport with the child witness, thus enabling the child to participate directly with the intermediary and express his or her views. It is argued that, considering the child's evolving capacities, the intermediary can also act as a representative of the child's views to the court.

## 6 The use of intermediary services

### 6.1 Testifying through an intermediary

The use of an intermediary when a child is testifying in criminal proceedings was introduced in South Africa in 1993,<sup>144</sup> following the compilation of a working paper by the SALC.<sup>145</sup> Towards the end of 2007, certain amendments took effect, allowing the appointment of an intermediary for persons with mental disabilities, and acknowledging the vulnerability of children less than 18 years of age.<sup>146</sup> Cognisant of the vulnerabilities of children testifying in court, section 170A(1) of the CPA authorised the appointment of an intermediary. For evidence to be led through an intermediary, a court should be satisfied that certain requirements have been met. This means that:

Whenever criminal proceedings are pending before any court and it appears to such court that it would expose any witness under the biological or mental age of eighteen years to undue mental stress or suffering if he or she testifies at such proceedings, the court may, subject to subsection (4), appoint a competent person as an intermediary in order to enable such witness to give his or her evidence through that intermediary.<sup>147</sup>

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<sup>143</sup> Section 10 of the *Children's Act*.

<sup>144</sup> Proc R64 in GG 15025 of 30 July 1993. In terms of s 61 of the *Children's Act*, the intermediary service system was introduced in the Children's Court.

<sup>145</sup> SALC *Working Paper 28*. This was followed by the Commission's Report (SALC *Report*), which gave rise to s 3 of the *Criminal Law Amendment Act 135 of 1991* introducing the concept of an intermediary.

<sup>146</sup> Van der Merwe "Children as Victims and Witnesses" 567; also see s 170A(7) of the CPA, and s 68 of the *Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007*, which came into effect in December 2007.

<sup>147</sup> Section 170A(1) of the CPA.

An intermediary can be seen as a facilitator who assists a child witness to testify and give evidence.<sup>148</sup> As a result, all communications exchanged between the child and the court takes place through the intermediary; from examination-in-chief, cross-examination to re-examination.<sup>149</sup> The intermediary acting as a communication conduit cannot ask his or her own questions, amend the meaning of the questions, or change the questions.<sup>150</sup> Thus, the intermediary's role is to translate the questions from the prosecution or accused, and put them to the child in a language that the child understands. The child's own answers or explanations are audible to the court, prosecution and defence during the proceedings.<sup>151</sup>

The child witness does not testify in an open court. The child and the intermediary are normally placed in a room adjacent to the courtroom, in any other room in the court building, or in another suitable place.<sup>152</sup> A CCTV is used to protect the child witness, giving the people in the courtroom sight of the separate room.<sup>153</sup> The court may, on the appointment of an intermediary, order that the witness shall then give his or her evidence at any place:

Which is informally arranged to set that witness at ease; or which is so situated that any person whose presence may upset that witness, is outside the sight and hearing of that witness; and which enables the court and any person whose presence is necessary at the relevant proceedings to see and hear, either directly or through the medium of any electronic or other devices, the intermediary as well as that witness during his or her testimony.<sup>154</sup>

The intermediary is not a party or witness to the proceedings; as such he or she is an independent participant in the trial.<sup>155</sup> The role of the intermediary is to create a child-friendly environment to enable the child to participate freely. This is described by the Constitutional Court<sup>156</sup> as follows:

The provision of an intermediary is intended to create this atmosphere [that is conducive for a child to speak freely about the events relating to the offence]. The child conveys his or her experiences to a person skilled in dealing with children. This person knows how to communicate with a child and to do so in a manner that is neither intimidating nor embarrassing to the child. But at the same time, this person is able to communicate what the child has conveyed to him or her to the adults in court. In short this person acts as a link to bridge the communication gap between the child and the court.

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<sup>148</sup> Schoeman *Training Program for Intermediaries* 204.

<sup>149</sup> Section 170A(2) of the CPA.

<sup>150</sup> Van der Merwe 1995 *Obiter* 197.

<sup>151</sup> Van der Merwe "Children as Victims and Witnesses" 570.

<sup>152</sup> Whitear-Nel 2006 *SACJ* 335.

<sup>153</sup> Schoeman *Training Programme for Intermediaries* 197.

<sup>154</sup> Section 170A(3) of the CPA.

<sup>155</sup> Schwikkard and Van der Merwe *Principles of Evidence* 378.

<sup>156</sup> *DPP v Minister of Justice* para 96.

The intermediary shields the child from any hardships imposed by the court. In cases where the child speaks any language other than English, the intermediary will also perform the role of court interpreter.

## **6.2 The criteria determining whether to appoint an intermediary**

Before appointing an intermediary, a court should be satisfied that certain requirements have been met. This is referred to as the "undue mental stress or suffering criterion." The test for determining whether an intermediary should be appointed is whether testifying at the proceedings would cause the child "undue mental stress or suffering" and not simply that the child is young.<sup>157</sup> The concepts in the phrase "undue mental stress or suffering" are by their very nature exceedingly vague and difficult to give content to.<sup>158</sup> Therefore, the decision as to whether to allow a child under the age of 18 to use an intermediary or not must be guided by factors such as the child's intelligence, age, gender and personality, and nature of the evidence, among other things.<sup>159</sup>

In *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development (DPP v Minister of Justice)*<sup>160</sup> the Constitutional Court had an opportunity to interpret the meaning of the (undefined) phrase "undue mental stress or suffering", and expand it from the narrow interpretation observed in prior case law.<sup>161</sup> Adopting the old approach would mean that section 170A(1) of the CPA can be invoked only if the witness would suffer more stress than would ordinarily have been experienced.<sup>162</sup> Nonetheless, research has indicated that even the ordinary stress suffered by children when testifying in a contested trial can be regarded as undue.<sup>163</sup> It is observed that the statutory section which sets out the guidelines as to which factors a court should take into account, in all criminal cases affecting children when determining the concept of "undue

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<sup>157</sup> In *S v Mathebula* 1996 4 All SA 168 (T), the court stated that youthfulness alone was not enough to warrant the use of an intermediary.

<sup>158</sup> Bekink 2014 CARSA 40; also see Van der Merwe "Children as Victims and Witnesses" 570.

<sup>159</sup> Whitear-Nel 2006 SACJ 339.

<sup>160</sup> *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development* 2009 2 SACR 130 (CC).

<sup>161</sup> For instance, in the case of *S v Stefaans* 1999 1 SACR 182 (C) 187F-G the court held that "undue" connotes a degree of stress greater than the ordinary stress to which witnesses, including witnesses in complaints of sexual nature, are subjected to.

<sup>162</sup> Bekink 2014 CARSA 40.

<sup>163</sup> Bekink 2014 CARSA 40. Also see Schoeman *Training Program for Intermediaries* 3, who argues that children generally find testifying in court as an upsetting experience.

mental stress or suffering" greatly enhances the defence of the interest of justice and of the best interest of the child in such cases.<sup>164</sup>

Relevant to this contribution is the finding that in appointing intermediaries, courts recognise and affirm the vulnerabilities of child witnesses. Thus, it is a statutory affirmation that child witnesses need protection within the criminal justice system.

## 7 Implementing protective measures

The CRC, the ACRWC and the UN Guidelines provide for the normative standards that are expected of every judicial body or tribunal when dealing with child witnesses in criminal proceedings. A child cannot be heard effectively where the environment is intimidating, hostile, insensitive or inappropriate for his or her age.<sup>165</sup> It is submitted that the intermediary brings with him or her professional skills to relate with the child, and makes the proceedings less hostile, less insensitive and less intimidating. During trial proceedings the aura of the court must be both accessible and child-appropriate to enhance the child's participation. Some commendable steps which could be taken are listed below.

### 7.1 Witness preparation

Child court preparation is the process of orienting the child to the court environment and proceedings.<sup>166</sup> Court familiarisation gives the child the confidence to testify. Simply put, it realises the right of the child witness to be informed about issues such as his or her role as a witness, the ways in which questioning is conducted, the existing support mechanisms after testifying (if there are any) during court proceedings, and the availability of protective measures. Though there are other court preparation officials, the intermediary often does the child's court preparation.<sup>167</sup> Acting as a neutral party into the proceedings, the intermediary can independently prepare the child witness for court without influencing his or her testimony.<sup>168</sup> This preparation is separate from coaching the child for trial.

A child witness effectively prepared to testify is equipped with the necessary knowledge of the judicial system.<sup>169</sup> The child witness is empowered physically and emotionally for the experience of testifying.<sup>170</sup> The question

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<sup>164</sup> Bekink 2014 CARSA 41.

<sup>165</sup> Schoeman *Training Program for Intermediaries* 94.

<sup>166</sup> Ghetti, Alexander and Goodman 2002 *Int'l J L & Psychiatry* 239.

<sup>167</sup> Schoeman *Training Program for Intermediaries* 184.

<sup>168</sup> Burgos Mata *et al Handbook for Professionals* 69.

<sup>169</sup> Schoeman *Training Program for Intermediaries* 184.

<sup>170</sup> Muller *Preparing Children for Courts* 103.

of when a child can be prepared to testify differs. In most cases, the child is oriented on the day of the trial while he or she waits to testify. Factors that may lead to orientation on the trial date are reducing the expense for the witness of frequenting the courtroom, and minimising the number of interactions and interviews with the child.

## 7.2 The hearing

The intermediary is more important during the trial when the child is testifying. At this time the intermediary will be visible to the child, the court and the accused. The intermediary then acts as a professional support person equipped to make the child witness feel comfortable, as well as to help the court conduct the trial. It is in the best interests of the child witness that testifying be done from a separate room, using a CCTV or a screen, to avoid further hardships and confrontation with the accused person.<sup>171</sup> Every interaction with the child has to be made via the intermediary.<sup>172</sup> Thus, the child witness freely participates in the proceedings without knowledge of the court environment and the people watching from the other end. The accused person and his or her attorney, the prosecutor and any other person in the court will be positioned to see and hear the evidence from the separate room.<sup>173</sup> It is respectfully submitted that the intermediary will serve to promote the best interests of the child throughout the trial.

## 8 Conclusion

This contribution has dealt essentially with the protection of child witnesses during a criminal trial in South Africa. What is clear from the discussion is that child witnesses are a vulnerable group and in need of protection. Section 39(1)(b) of the *Constitution*, places an obligation on courts to consider international law, when interpreting the Bill of Rights. Thus in interpreting children's constitutional rights, it is evidence from case law that the courts have adopted international law to give effect to the realisation of children's rights. Though the CRC and ACRWC do not specifically refer to child witnesses, it is clear that the guiding principles therein enshrine the best interests of the child principle as well as the right of the child to participate. Court criminal proceedings are not usually child-friendly and intermediaries can assist child witnesses during this judicial process. This also gives effect to the child's right to participate in judicial proceedings.<sup>174</sup> The inclusion of intermediary services in South Africa clearly adheres to the

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<sup>171</sup> Section 158 of the CPA.

<sup>172</sup> Section 170(2)(a) of the CPA.

<sup>173</sup> Section 170(3)(c) of the CPA. In the light of the accused person's constitutional right to a fair trial in terms of s 35 of the *Constitution*.

<sup>174</sup> Article 12(2) of the CRC.

international obligation of article 12(2) of the CRC and article 4(2) of the ACRWC.<sup>175</sup> It is evident that significant progress has been made to adhere to international obligations and ensure the protection of child witnesses in South Africa.

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<sup>175</sup> Article 12(2) of the CRC.



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### **List of Abbreviations**

ACRWC	African Charter on the Rights and Welfare of the Child
AHRLJ	African Human Rights Law Journal
CARSA	Child Abuse Research: A South African Journal
CCTV	closed circuit television
CLP	Current Legal Problems
CRC	United Nations Convention on the Rights of the Child
DJCD	Department of Justice and Constitutional Development
DSD	Department of Social Development
ESC	United Nations Economic and Social Council

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Int'l J Children's Rts	International Journal of Children's Rights
Int'l J L & Psychiatry	International Journal of Law and Psychiatry
NPA	National Prosecuting Authority
SACJ	South African Journal of Criminal Justice
SALC	South African Law Commission
SAPR/PL	Suid-Afrikaanse Publiekreg / South African Public Law
THRHR	Tydskrif vir die Hedendaagse Romeins- Hollandse Reg
UN	United Nations